

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 2018-CA-012128-O

SHARRIF K. FLOYD

Plaintiff,

vs.

DR. JAMES ANDREWS, M.D.; DR. GREGORY
HICKMAN, M.D.; DR. CHRISTOPHER WARRELL,
M.D.; DR. TARIQ HENDAWI, M.D.; THE ANDREWS
INSTITUTE AMBULATORY SURGERY CENTER,
LLC; PARADIGM ANESTHESIA, P.A.; BAPTIST
HOSPITAL, INC.; BAPTIST HEALTH CARE
CORPORATION; GULF BREEZE HOSPITAL, INC.,
BAPTIST HOSPITAL, INC. d/b/a GULF BREEZE
HOSPITAL; AND BAPTIST PHYSICIAN GROUP, LLC,

Defendants.

**DEFENDANT, ANDREWS INSTITUTE AMBULATORY SURGERY CENTER,
LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND
MEMORANDUM IN SUPPORT THEREOF**

COMES NOW Defendant, ANDREWS INSTITUTE AMBULATORY
SURGERY CENTER, LLC (hereinafter "ASC"), by and through their undersigned
counsel, and pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, file this Motion
to Dismiss Plaintiff's Complaint and in support thereof state:

1. The instant action arises out of medical care and treatment Plaintiff Sharrif
Floyd, a former NFL defensive lineman, received from ASC at its facility in Gulf Breeze,

Florida. Mr. Floyd, who underwent right knee surgery in September 2016, alleges his treating physicians committed medical negligence, bringing an early end to his professional football career.

2. Plaintiff's Complaint consists of eight counts against nine Defendants. Four of these counts seek to establish vicarious liability under either an agency theory or a theory of joint venture.

3. Count II of Plaintiff's Complaint asserts a claim for breach of nondelegable duty against Defendant ASC.

4. Counts II, III, VI, VII, and VIII of Plaintiff's Complaint fail to allege ultimate facts required to state a cause of action that Defendant ASC is directly or vicariously liable for the negligence alleged in Plaintiff's Complaint.

5. For the foregoing reasons, which are more fully developed in the Memorandum of Law incorporated herein, Defendants request this Honorable Court enter an Order dismissing Counts II, III, VI, VII, and VIII of Plaintiff's Complaint.

MEMORANDUM OF LAW

A. Standard of Review

Under Florida law, a motion to dismiss pursuant to Rule 1.140(b)(6), Florida Rules of Civil Procedure, tests the sufficiency of the complaint to state a cause of action. In ruling on such a motion, the trial court must confine itself strictly to the allegations within the four corners of the complaint. *McWhirter, Reeves, McGlothlin, Davidson, Reif, and Bakas, P.A. v. Weiss*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998). A motion to dismiss should be granted if it appears the set of facts alleged by the plaintiffs in support of their

claims, even if true, do not support a claim which would entitle them to relief. *Wausau Ins. Co. v. Haynes*, 683 So. 2d 1123, 1124 (Fla. 5th DCA 1996); *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The Florida Rules of Civil Procedure require a “short and plain statement of the ultimate facts showing the pleader is entitled to relief.” Fla. R. Civ. P. 1.110. In order to survive dismissal, the operative complaint must allege legal liability by stating the elements of a cause of action and must plead factual matters sufficient to apprise the adversary of what he or she is called upon to answer, so that the court may determine the legal effect of the complaint. *See e.g., Messana v. Maule Industries*, 50 So.2d 874 (Fla. 1951). It is insufficient to merely allege conclusions or self-serving statements. *Bankers Trust Realty, Inc. v. Kluger*, 672 So.2d 897 (Fla. 3d DCA 1996). Stated differently, Plaintiffs are not entitled to have the court accept as true conclusory assertions or summary claims as to the applicability of the facts alleged. *See Messana*, 50 So.2d at 876.

Counts II, III, IV, VII, and VIII of Plaintiff’s Complaint should be dismissed as to Defendant ASC as they fail to set forth specific allegations of ultimate fact as required by the Florida Rules of Civil Procedure. Such failure is fatal and prevents ASC from formulating appropriate responses and/or ascertaining any and all relevant affirmative defenses to the allegations raised in Plaintiff’s Complaint.

B. Count II Fails to State a Claim for Breach of Nondelegable Duty as the Regulation Cited by Plaintiff Does Not Apply to ASC

Count II of Plaintiff's Complaint alleges that Rule 59A-3.2085(4) of the Florida Administrative Code imposed upon ASC "a non-delegable tudy to provide non-negligent anesthesia services". (Pl. Compl. at ¶ 75).

As a threshold matter, the AHCA regulation cited by Plaintiff does not apply to ASC. Rule 59A-3.2085(4) stated:¹

"(4) Anesthesia Department. Each Class I and Class II hospital, and each Class III hospital providing surgical or obstetrical services, shall have an anesthesia department, service, or similarly titled unit directed by a physician member of the organized professional staff."

ASC is not a Class I or Class II hospital. ASC is not a Class III hospital. ASC is a licensed ambulatory surgery center, a distinct classification of facility subject to separate AHCA regulations and administrative rules.² Accordingly, Plaintiff's claim that Rule 59A-3.2085(4) of the Florida Administrative Code imparts a non-delegable duty upon ASC is without merit and Count II should be dismissed.

C. Counts IV and VIII Fail to Establish Actual Agency as Plaintiff Has Failed to Set Forth Sufficient Factual Allegations

In Counts III and VII, Plaintiffs seek to assert vicarious liability against ASC on the theory it is a principal and Drs. Andrews, Hendwai, Hickman, and Warrell were its agents. However, none of the three elements of actual agency are met by factual

¹ The rule cited by Plaintiff – Rule 59A-3.2085(4) – was repealed by AHCA effective November 21, 2018. The specific subsection Plaintiff references in his Complaint is now located under Rule 59A-3.245. For the purposes of accuracy, Defendant ASC's citation refers to the text from the version of Rule 59A-3.2085(4) which existed prior to its repeal. The language of current Rule 59A-3.245 is nearly identical.

² The rule cited by Plaintiff resides in Rule Chapter 59A-3, the Florida Administrative Code chapter governing hospital licensure. Rule Chapter 59A-5 of the Florida Administrative Code governs ambulatory surgical center licensure.

allegations in Plaintiff's Complaint. Hence, Counts III and VII should be dismissed as to ASC.

To establish an actual agency relationship under Florida law, Plaintiff must show (1) acknowledgement by the principal that the agent will act for him or her; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *Gillet v. Watchtower Bible & Tract Soc'y of Pa., Inc.*, 913 So.2d 618, 620 (Fla. 3d DCA 2005) (citing *Goldschmidt v. Holman*, 571 So.2d 422, 424 n.5 (Fla. 1990)).

Plaintiff's Complaint lacks any specific factual assertions that would establish ASC acknowledged Drs. Andrews, Hendawi, Hickman, or Warrell would act as its agents or that these doctors accepted such an undertaking. Additionally, Plaintiff sets forth no factual assertions that ASC exerted the right to control the actions of Drs. Andrews, Hendawi, Hickman, or Warrell. The question of control for agency purposes "must be determined by examining all the rights and duties of the parties under the agreement." *Ortega v. General Motors Corp.*, 392 So.2d 40, 42 (Fla. 4th DCA 1980).

Plaintiff's Complaint is devoid of any allegations setting forth the rights and duties of the purported principal-agent relationship, instead relying on the bare-bones legal conclusion that "an agency relationship existed." (Pl. Compl. at ¶¶ 80, 105). This, without more, is insufficient to establish agency and, as a result, Claims III and VII should be dismissed as to Defendant ASC.

D. Counts IV and VIII Fail to Establish Joint Venture as Plaintiff Has Failed to Set Forth Sufficient Factual Allegations

Plaintiffs Counts for Joint Venture – Counts IV and VIII – are nothing more than a blanket recitation of the legal elements that need to be pled for the cause of action.

To establish joint venture, the following elements must be established in addition to those required to form a basic contract: (1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained.

Kislak v. Kreedian, 95 So.2d 510, 515 (Fla. 1957). The absence of any one of these elements precludes a finding of a joint venture. *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So.3d 1076, 1089 (Fla. 2008).

ASC is unable to properly formulate an appropriate response to Plaintiff's bare, conclusory, and vague allegations put forth in Counts IV and VIII. First, in order to survive this Motion to Dismiss, there must be either a contract to base the alleged joint venture on or allegations of ultimate fact establishing each element of a joint venture. "A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated into the complaint." *Walters v. Ocean Gate Phase I Condominium*, 925 So.2d 440, 443-444 (citing *Contractors Unlimited v. Nortrax Equip. Co. Southeast*, 833 So.2d 286, 288 (Fla. 5th DCA 2002); *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001); and Fla. R. Civ. P. 1.130(a)).

Additionally, Plaintiff fails to plead adequate facts to support each element of a joint venture. Instead of pleading specific facts, Plaintiff opts instead for bare bones legal conclusions. Plaintiff's Complaint alleges that Defendants "jointly control their operations in the provision of surgical or anesthesia services to professional athletes, including Plaintiff, through ASC." (Pl. Compl. at ¶¶ 89, 114). As a primary concern, this is a legal conclusion and not a factual assertion and Plaintiff's Complaint provides no factual support with regard to when, how, or where any agreement to jointly control operations was reached. Furthermore, merely stating that Defendants held joint control is not enough. Plaintiff must show ASC enjoyed the right to control day-to-day operations of each alleged member of the joint venture. *See e.g., Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.*, 694 So.2d 827, 831 (Fla. 4th DCA 1997); *A&A Elec. Servs., Inc. v. Jurado*, 198 So.3d 37, 42-43 (Fla. 2d DCA 2015). Plaintiff's Complaint includes similarly conclusory statements regarding the remaining elements of joint venture. (Pl. Compl. at ¶¶ 90-93, 115-119). Plaintiff cannot speak a joint venture relationship into existence, Florida requires him to allege supporting facts. Accordingly, Counts IV and VIII should be dismissed as to Defendant ASC.

CONCLUSION

Plaintiff has failed to provide factual allegations in support of his allegations for vicarious or joint venture liability against Defendant ASC. Plaintiff has further failed to properly set forth a claim for breach of a nondelegable duty on the part of Defendant ASC. Plaintiff's Complaint is little more than bare legal conclusions and, as such,

Defendant ASC is entitled to the entry of an Order dismissing Counts II, III, IV, VII, and VIII of Plaintiff's Complaint.

WHEREFORE, Defendant, ANDREWS INSTITUTE AMBULATORY SURGERY CENTER, LLC, respectfully requests that this Honorable Court enter and Order granting its Motion to Dismiss Counts II, III, IV, VII, and VIII of Plaintiff's Complaint, as well as any other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been electronically filed with the Clerk of the Court, and a true and correct copy was furnished to the following counsel on this 18th day of March, 2019, as follows:

Brad R. Sohn, Esq.
THE BRAD SOHN LAW FIRM, PLLC
2600 S. Douglas Road, Suite 1007
Coral Gables, Florida 33134
brad@sohn.com
Attorney for Plaintiff

☐ Via U.S. Mail
☐ Via Fax No. _____
☒ Via Email
☐ Via Hand Delivery

Gabriel E. Nieto, Esq.
RASCO KLOCK PEREZ & NIETO, P.L
2555 Ponce De Leon Blvd., Suite 600
Coral Gables, Florida 33134
gnieto@rascoklock.com
Attorney for Plaintiff

☐ Via U.S. Mail
☐ Via Fax No. _____
☒ Via Email
☐ Via Hand Delivery

J. Nixon Daniel, III, Esq.
BEGGS & LANE, RLLP
501 Commendencia Street
P.O. Box 12950
Pensacola, Florida
jnd@beggslane.com

☐ Via U.S. Mail
☐ Via Fax No. _____
☒ Via Email
☐ Via Hand Delivery

*Attorney for Dr. Andrews, Dr. Hendawi, Dr.
Warrell, BHCC, BHI, and BPG*

Jesse Suber, Esq.
HENRY BUCHANAN, P.A.
2508 Barrington Circle
P.O. Box 14079
Tallahassee, Florida 32317
jsuber@henryblaw.com

Attorney for Dr. Hickman and Paradigm

- ☐ Via U.S. Mail
- ☐ Via Fax No. _____
- ☒ Via Email
- ☐ Via Hand Delivery

HALL BOOTH SMITH, P.C.



S. WILLIAM FULLER, JR.

Florida Bar No.: 131557

KIRK A. CARTER

Florida Bar No.: 123035

2565 Barrington Circle

Tallahassee, Florida 32308

Tel: (850) 270-2149

Fax: (850) 692-5843

wfuller@hallboothsmith.com

kcarter@hallboothsmith.com

sfranks@hallboothsmith.com

*Attorneys for Andrews Institute Ambulatory
Surgery Center, LLC*